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In the Supreme Court of the United States

October Term, 1973
No. 73-409

JOAN K. GORDON and BANK OF NEVADA, Co-Administrators of the Estate of JAMES L. GORDON, aka J. L. GORDON, *Petitioners,*

vs.

GERALDINE L. LIGHTENBURGER, individually, GREGORY DALE LIGHTENBURGER, a minor, DENISE SUE LIGHTENBURGER, a minor, MADYLON LESLIE LIGHTENBURGER, a minor, by and through their Guardian *ad Litem*, GERALDINE L. LIGHTENBURGER, *Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of the State of Nevada.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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IN THE

Supreme Court of the United States

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No. 73-409

JOAN K. GORDON and BANK OF NEVADA, Co-Administrators of the Estate of JAMES L. GC[illegible] L. GORDON,

vs.

GERALDINE L. LIGHTENBURGER, individually, GREGORY DALE LIGHTENBURGER, a minor, DENISE SUE LIGHTENBURGER, a minor, MADYLON LESLIE LIGHTENBURGER, a minor, by and through their Guardian *ad Litem*, GERALDINE L. LIGHTENBURGER,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Nevada.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

Respondents initially assert the incompleteness of the opening statement on the first page of the petition that the Supreme Court of the State of Nevada holding was "that the aviation guest statute in the State of California was void on the grounds that it violated the equal protection clause of the United States Constitution." This incompleteness will be corrected in the Statement hereinbelow in order that the record not be distorted to give an impression that a federal question has been properly presented.

Opinions Below.

The petition has omitted the fact that on June 21, 1973, the Supreme Court of Nevada denied a petition for rehearing filed by petitioners. The significance of this omission will become apparent in the Statement hereinbelow, where it will be explained that (1) the petitioners failed to properly raise and have now made an untimely assertion of the federal question sought to be reviewed and (2) the judgment of the Supreme Court of Nevada rested on an adequate non-federal basis.

Jurisdiction.

Respondents do not question the jurisdiction as set forth in the petition, except to assert that (1) the petitioners failed to properly raise and have now made an untimely assertion of the federal question sought to be reviewed and (2) the judgment of the Supreme Court of Nevada rested on an adequate non-federal basis.

Questions Presented.

The petition for certiorari sets out a federal question, but predicates the question upon an incomplete statement of the case, viewed against the opening statement on the first page of the petition with reference to what the Supreme Court of the State of Nevada held, thereby distorting the record below to give an impression that a federal question has been properly presented.

State Constitutional Provisions Involved.

Article I, sections 11 and 21 of the California Constitution guarantee to every person that "(a)ll laws of a general application shall have a uniform operation" and that "(no) citizen, or class of citizens, (shall) be granted privileges or immunities which, upon the same

terms, shall not be granted to all citizens." It is noted that these California state constitutional provisions were expressly stated to be one of the bases for the decision of the Supreme Court of California in *Brown v. Merlo,* 8 Cal.3d 855, 106 Cal.Rptr. 388, 506 P.2d 212 (1973).

Statement of the Case.

The petition for certiorari sets out an incomplete statement of the case which requires correction in the following respects: After the rendition of the decision by the Supreme Court of California in *Brown v. Merlo, supra,* which expressly cited California state constitutional provisions as one of the bases for the decision, respondents filed a "Motion for Leave to Cite Additional Authority Published After Oral Argument," a copy of which is annexed hereto as Appendix A, wherein reference was made to the California state constitutional provisions as one of the bases for the decision. Petitioners filed no opposition to the motion. The Supreme Court of Nevada filed its Order of May 7, 1973, a copy of which is annexed hereto as Appendix B. Thereafter, respondents filed a "Motion for Leave to File Supplemental Brief Based Upon Order Filed May 7, 1973," a copy of which is annexed hereto as Appendix C, wherein reference was again made to the California state constitutional provisions as one of the bases for the decision. Petitioners then filed a "Memorandum of Points and Authorities in Opposition to Appellants' Motion for Leave to File Supplemental Brief Based Upon Order Filed May 7, 1973," a copy of which is annexed hereto as Appendix D, wherein petitioners asserted no federal question, but merely asked for "an end to brief writing and an end to litigation." The Supreme Court of Nevada filed its Order

of May 24, 1973, a copy of which is annexed hereto as Appendix E. Thereafter, on June 6, 1973, the Supreme Court of Nevada rendered its decision and expressly stated (1) "Each trial was presented to the court and jury on the basis of California law" (Page A3, lines 5 to 6, Petition for Certiorari); (2) "On February 20, 1973, the California Supreme Court handed down its decision in *Brown v. Merlo,* 8 Cal.3d 855, 106 Cal.Rptr. 388, 506 P.2d 212, holding that the automobile guest statute of that state violates the equal protection guarantees of the California and United States Constitutions" (Page A4, lines 1 to 6, Petition for Certiorari); (3) "* * * the court also effectively nullified the airplane guest statute which was modeled after the automobile provision." (Page A4, lines 24 to 26, Petition for Certiorari); "* * * we cannot discern how automobile, airplane or motorboat guests can rationally be distinguished from all other guests * * *" (quoting from the California Supreme Court decision, on Page A4, Footnote 2); "* * * the respondents (petitioners herein) suggest that the matter should be put to rest notwithstanding that decision. This, we cannot do." (Page A5, lines 8 to 10, Petition for Certiorari). Thereafter, petitioners filed a "Petition for Rehearing," a copy of which is annexed hereto as Appendix F, which is completely silent with respect to the federal question presented for review in this petition. Respondents filed a "Reply to Petition for Rehearing," a copy of which is annexed hereto as Appendix G, which clearly stated in a pertinent part: "The Supreme Court of Nevada merely recognized that determination by the highest court of a sister state." Rehearing was denied June 21, 1973.

ARGUMENT.

1. The federal question sought to be reviewed was not timely or properly raised, or expressly passed on. The question presented in the petition for certiorari is a complete afterthought, conceived after all other contentions were rejected by the Supreme Court of Nevada.

2. The judgment of the Supreme Court of Nevada rests on an adequate non-federal basis. The Supreme Court of Nevada merely decided that California substantive law was controlling, that the California Supreme Court had in effect nullified the California airplane guest statute and that one of the bases for the decision of the California Supreme Court was the conflict between the California guest statute and the California state constitutional provisions, specifically, Article I, sections 11 and 21 of the California Constitution.

3. The alleged federal question, assuming *arguendo* that it had been timely or properly raised, or expressly passed on, or that it was a predicate for the judgment without regard for a non-federal basis, is not a question of substance, viewed against the thorough analysis of the factors leading the Supreme Court of California to reach its conclusion and the careful effort to distinguish the 44-year-old case relied upon on page 5 of the petition for certioriari, namely, *Silver v. Silver*, 280 U.S. 117, 50 S.Ct. 57, 74 L.Ed. 221 (1929). That distinction is emphatically discussed by the Supreme Court of California in *Brown v. Merlo, supra*, at footnote 4, on pages 217-218 of 506 P.2d, as follows:

> "4. Over 40 years ago, in Silver v. Silver (1929) 280 U.S. 117, 50 S.Ct. 57, 74 L.Ed. 221,

the United States Supreme Court did uphold the constitutionality of a Connecticut automobile guest statute in the face of an equal protection challenge. In Silver, however, the plaintiff had attacked the statute solely on the ground that the distinction drawn between automobile guests and guests in other conveyances was impermissible; in rejecting this argument, the Supreme Court did not consider the reasonableness of the two additional statutory distinctions—between 'guests' and paying passengers and between different categories of automobile guests—which are attacked in the instant case. In addition, because of the focus of the plaintiff's argument, the *Silver* court approached the guest statute simply as one of the many automobile regulatory measures then rapidly coming into existence, and rejected plaintiff's constitutional challenge largely on the basis of the uniqueness of automobiles. That analysis, however, is not adequate to justify the multilevel classification scheme involved in California's guest statute.

"Moreover, unlike the present case, the Connecticut statute reviewed in *Silver* was not set against the background of (1) almost universal liability insurance and (2) such decisions as Rowland v. Christian (1968) 69 Cal.2d 108, 70 Cal. Rptr. 97, 443 P.2d 561, Silva v. Providence Hospital (1939) 14 Cal.2d 762, 97 P. 2d 798, and Emery v. Emery (1955) 45 Cal.2d 421, 289 P. 2d 218. As we explain hereafter, the current factual and legal setting demonstrates the unreasonableness of the guest statute's discriminatory treatment of automobile guests. For all these reasons, the decision in *Silver* does not control the instant case."

Conclusion.

For the foregoing reasons, respondents respectfully urge that the petition for a writ of certiorari should be denied.

Respectfully submitted,

MORTON R. GALANE, ESQ.,

ROBERT F. LIST, ESQ.,

Attorneys for Respondents.

APPENDIX "A."

Motion for Leave to Cite Additional Authority Published After Oral Argument.

In the Supreme Court of the State of Nevada.

Geraldine L. Lightenburger, individually, Gregory Dale Lightenburger, a minor, Denise Sue Lightenburger, a minor, Madylon Leslie Lightenburger, a minor, by and through their Guardian, ad Litem, Geraldine L. Lightenburger, Appellants, vs. Joan K. Gordon and Bank of Nevada, Co-Executors of the Estate of James L. Gordon, a/k/a J. L. Gordon, Respondents. Case No. 5704.

Appellants move the Supreme Court of Nevada for leave to cite the following authority published after the oral argument on March 23, 1973, in 506 P.2d—No. 2: *Brown v. Merlo,* 106 Cal.Rptr. 388, 506 P.2d 212 (1973). The Supreme Court of California declared the California guest statute, as applied to a negligently injured guest, in violation of the equal protection guarantees of the California and United States Constitutions.

Respectfully submitted,

MORTON GALANE, ESQ., and
ROBERT F. LIST, ESQ.

/s/ BY Morton R. Galane
MORTON R. GALANE
1100 First National Bank Building
Las Vegas, Nevada 89101

Attorneys for Appellants

RECEIPT OF COPY of the foregoing "Motion For Leave to Cite Additional Authority Published After Oral Argument" is hereby acknowledged this 25th day of April, 1973.

BECKLEY, DE LANOY & JEMISON, CHARTERED

/s/ BY Rex A. Jemison, Esq.
REX A. JEMISON
1000 First National Bank Building
Las Vegas, Nevada 89101

Attorneys for Respondents

APPENDIX "B."

Order.

In the Supreme Court of the State of Nevada.

Geraldine L. Lightenburger, individually, Gregory Dale Lightenburger, a minor, Denise Sue Lightenburger, a minor, Madylon Leslie Lightenburger, a minor, by and through their Guardian ad Litem, Geraldine L. Lightenburger, Appellants, vs. Joan K. Gordon and Bank of Nevada, Co-Executors of the Estate of James L. Gordon, a/k/a J. L. Gordon, Respondents. No. 5704.

Filed: May 7, 1973.

Pursuant to unopposed motion of appellants seeking leave to cite additional authority published after oral argument, and good cause appearing, it is

ORDERED that appellants are granted leave to cite as additional authority the case of Brown v. Merlo, 506 P.2d 212 (Cal. 1973).

/s/ Batjur, *J.*

cc: Counsel of record

APPENDIX "C."

Appellants' Motion for Leave to File Supplemental Brief Based Upon Order Filed May 7, 1973.

In the Supreme Court of the State of Nevada.

Geraldine L. Lightenburger, individually, Gregory Dale Lightenburger, a minor, Denise Sue Lightenburger, a minor, Madylon Leslie Lightenburger, a minor, by and through their Guardian ad Litem, Geraldine L. Lightenburger, Appellants, vs. Joan K. Gordon and Bank of Nevada, Co-Executors of the Estate of James L. Gordon, a/k/a J. L. Gordon, Respondents. Case No. 5704.

Appellants move the court for leave to file a supplemental brief upon the following two legal issues, based upon the Order filed May 7, 1973, a copy of which is annexed hereto as Exhibit "A", which cites the determination by the Supreme Court of California in *Brown v. Merlo*, 106 Cal.Rptr. 388, 506 P.2d 212 (1973) that the California guest statute, as applied to a negligently injured guest, violates the equal protection guarantees of the California and United States Constitutions:

I.

Specification of Legal Errors No. 2 (Page 3, lines 1-6, of Appellants' Opening Brief), which reads as follows:

> "2. The court committed an error in law occurring at the trial and objected to by the appellants when the court on July 7, 1967 refused to give Instruction P-1, which read: 'You are instructed that the issue of the status of Dale Lightenburger in the airplane, namely, whether he was a passenger for consideration or a guest, is withdrawn from the jury's consideration.' "

II.

The additional legal issue asserted in the additional brief filed by appellants pursuant to the order permitting each party to file an additional brief, (Page 2, lines 5-12, of additional brief):

> "Whether an interpretation by a California appellate court of a California statute, Section 21406 of the California Public Utilities Code, which makes the liability of a pilot or account of the death of an occupant in the aircraft dependent on a determination of the occupant's status (passenger or guest) under California law, was denied full faith and credit by the Nevada District Court in violation of Article IV, Section 1, of the United States Constitution, and the Act of June 25, 1948, c. 646, 62 Stat. 947, 28 U.S.C. §1738 enacted to implement the constitutional provision?"

MORTON GALANE, ESQ., and
ROBERT F. LIST, ESQ.
/s/ BY Morton R. Galane
MORTON R. GALANE
1100 First National Bank Building
Las Vegas, Nevada 89101

Attorneys for Appellants

RECEIPT OF COPY of the foregoing "Appellants' Motion for Leave to File Supplemental Brief Based Upon Order Filed May 7, 1973" is hereby acknowledged this 15th day of May, 1973.

BECKLEY, DE LANOY & JEMISON,
Chartered
/s/ Rex A. Jemison Esq.
REX A. JEMISON
1000 First National Bank Building
Las Vegas, Nevada 89101

Attorneys for Respondents

Order.

In the Supreme Court of the State of Nevada.

Geraldine L. Lightenburger, individually, Gregory Dale Lightenburger, a minor, Denise Sue Lightenburger, a minor, Madylon Leslie Lightenburger, a minor, by and through their Guardian ad Litem, Geraldine L. Lightenburger, Appellants, vs. Joan K. Gordon and Bank of Nevada, Co-Executors of the Estate of James L. Gordon, a/k/a J. L. Gordon, Respondents. No. 5704.

Filed: May 7, 1973.

Pursuant to unopposed motion of appellants seeking leave to cite additional authority published after oral argument, and good cause appearing, it is

ORDERED that appellants are granted leave to cite as additional authority the case of Brown v. Merlo, 506 P.2d 212 (Cal. 1973).

/s/ Batjur, *J.*

cc: Counsel of record

APPENDIX "D."

Memorandum of Points and Authorities in Opposition to Appellants' Motion for Leave to File Supplemental Brief Based Upon Order Filed May 7, 1973.

In the Supreme Court of the State of Nevada.

Geraldine L. Lightenburger, individually, Gregory Dale Lightenburger, a minor, Denise Sue Lightenburger, a minor, Madylon Leslie Lightenburger, a minor, by and through their Guardian ad Litem, Geraldine L. Lightenburger, Appellants, v. Joan K. Gordon and Bank of Nevada, Co-Executors of the Estate of James L. Gordon, a/k/a J. L. Gordon, Respondents. No. 5704.

Received May 23, 1973.

The present action was filed June 18, 1963. The third and last trial was completed on July 10, 1967. Thereafter, appellants filed twelve post-trial motions. On April 15, 1969 this Court vacated oral argument. Four additional briefs have been filed by the parties in addition to the briefs normally allowed on appeal.

It is respectfully submitted that there should be an end to brief writing and an end to litigation.

Respectfully submitted,

BECKLEY, DE LANOY & JEMISON,
Chartered

/s/ By Rex A. Jemison

Attorneys for Respondents
1000 First National Bank Building
Las Vegas, Nevada 89101

CERTIFICATION OF MAILING—N.R.C.P. 5(b)

I hereby certify that on May 22, 1973, I served the within Memorandum of Points and Authorities in Opposition to Appellants' Motion for Leave to File Supplemental Brief Based Upon Order Filed May 7, 1973 on the attorney for Appellants by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada, addressed as follows:

MORTON R. GALANE, ESQ.
1100 First National Bank Building
Las Vegas, Nevada 89101
and
ROBERT F. LIST, ESQ.
Ormsby County Courthouse
Carson City, Nevada

Dated this 22 day of May, 1973.

/s/ Layner Nelson
An employee of BECKLEY, DE LANOY & JEMISON, Chartered

APPENDIX "E."

Order.

In the Supreme Court of the State of Nevada.

Geraldine L. Lightenburger, individually, Gregory Dale Lightenburger, a minor, Denise Sue Litenburger, a minor, Madylon Leslie Lightenburger, a minor, by and through their Guardian ad Litem, Geraldine L. Lightenburger, Appellants. vs. Joan K. Gordon and Bank of Nevada, co-Executors of the Estate of James L. Gordon, a/k/a J. L. Gordon, Respondents. No. 5704.

Filed: May 24, 1973.

Good cause appearing,

Appellants' motion to file an additional supplemental brief is denied.

It is so ORDERED.

/s/ Thompson, *C. J.*

cc: Messrs. Galane, Tingey & Shearing
Messrs. Beckley, De Lanoy & Jemison

APPENDIX "F."

Petition for Rehearing.

In the Supreme Court of the State of Nevada.

Geraldine L. Lightenburger, individually, Gregory Dale Lightenburger, a minor, Denise Sue Lightenburger, a minor, Madylon Leslie Lightenburger, a minor, by and through their Guardian ad Litem, Geraldine L. Lightenburger, Appellants, vs. Joan K. Gordon and Bank of Nevada, Co-Executors of the Estate of James L. Gordon, a/k/a J. L. Gordon, Respondents. No. 5704.

Received June 19, 1973.

COME NOW Respondents and petition the Court for a rehearing upon the following ground: In determining the retroactive effect of *Brown v. Merlo,* 506 P.2d 212 (Cal. 1973), the Court relied upon Nineteenth Century decisions which set forth the "Blackstonian" view which was followed by the United States Supreme Court in *Norton v. Shelby County,* 118 U.S. 425, 6 S. Ct. 1121, 30 L.ed. 178 (1886), wherein the court held that an unconstitutional statute is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed. This was the rule in the Nineteenth Century. However, that concept has undergone a gradual erosion with the decisions in *Great Northern R. Co. v. Sunburst Oil & Refining Co.,* 287 U.S. 358, 53 S.Ct. 145, 77 L.ed. 360 (1932) and *Chicot County Drainage Dist. v. Baxter State Bank,* 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940). In *Great Northern,* the Court rejected the argument that the Constitution was abridged by the

lower court's refusal to apply its ruling retroactively, holding at page 364 of 287 U.S., at page 148 of 53 S.Ct.:

> "We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, through later overruled, are law none the less for intermediate transactions. Indeed there are cases intimating, too broadly (cf. Tidal Oil Co. v. Flanagan [263 U.S. 444, 44 S.Ct. 197, 68 L.Ed. 382]) that it *must* give them that effect; but never has doubt been expressed that it *may* so treat them if it pleases, whenever injustice or hardship will thereby be averted." [Emphasis by the court.]

Similarly, in *Chicot*, the court asserted that broad statements as to the effect of a determination of unconstitutionality, such as that in *Norton v. Shelby County*, supra, must be taken with qualifications. The court further stated at page 374 of 308 U.S., at page 318 of 60 S.Ct.:

> "The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, —with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its

previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from the numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified."

Whatever vestige of the "Blackstonian" view of absolute retroactivity remained after *Great Northern* and *Chicot* was ultimately laid to rest by the Supreme Court in *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.ed.2d 601 (1965), wherein the court held that "the accepted rule today is that in appropriate cases the court may, in the interest of justice, make the rule prospective". 381 U.S. at 628, 85 S.Ct. at 1737. Although *Linkletter* involved a constitutional issue of criminal procedure, it established that this rule applies to both civil and criminal litigation. *Linkletter v. Walker*, supra.

It is submitted that the Court should grant a rehearing for the purpose of determining whether a claim of "law of the case" constitutes a question of rights claimed to have become vested and whether it is in the interests of justice to make the rule prospective.

Respectfully submitted,

BECKLEY, DE LANOY & JEMISON,
Chartered

/s/ By Rex A. Jemison

Attorneys for Respondents
1000 First National Bank Building
Las Vegas, Nevada 89101

CERTIFICATE OF MAILING

I hereby certify that on June 18, 1973 I served the foregoing Petition for Rehearing by depositing a copy in the United States mails, postpaid, addressed to:

MORTON GALANE, ESQ.
1100 First National Bank Building
Las Vegas, Nevada 89101
and
ROBERT F. LIST, ESQ.
Ormsby County Courthouse
Carson City, Nevada
Attorneys for Appellants

their last known addresses.

/s/ Layna Nelson
An Employee of Beckley, DeLanoy & Jemison, Chartered

APPENDIX "G."

Reply to Petition for Rehearing.

In the Supreme Court of the State of Nevada.

Geraldine L. Lightenburger, individually, Gregory Dale Lightenburger, a minor, Denise Sue Lightenburger, a minor, Madylon Leslie Lightenburger, a minor, by and through their Guardian ad Litem, Geraldine L. Lightenburger, Appellants, vs. Joan K. Gordon and Bank of Nevada, Co-Executors of the Estate of James L. Gordon, a/k/a J. L. Gordon, Respondents. Case No. 5704.

Appellants, pursuant to Rule 34(3) of the Supreme Court Rules, files this their reply to respondents' petition for rehearing. The petition for rehearing fails to perceive that the Supreme Court of California, in *Brown v. Merlo,* 506 P.2d 212 (Cal. 1973), retroactively applied its determination that the California guest statute was unconstitutional. The Supreme Court of Nevada merely recognized that determination by the highest court of a sister state. The point has not been overlooked in the original opinion of the Supreme Court of Nevada. Therefore, the petition for rehearing should be denied.

Respectfully submitted,

MORTON GALANE, ESQ., and
ROBERT F. LIST, ESQ.

/s/ Morton Galane
MORTON GALANE
1100 First National Bank Building
Las Vegas, Nevada 89101

Attorneys for Appellants

RECEIPT OF COPY of the foregoing REPLY TO PETITION FOR REHEARING is hereby acknowledged this 19 day of June, 1973.

BECKLEY, DE LANOY & JEMISON,
Chartered
/s/ BY Rex A. Jemison/wlm
REX A. JEMISON
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Las Vegas, Nevada 89101
Attorneys for Respondents